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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

JACK ROBERT PURDOM,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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No. .....

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OPINION BELOW.

The opinion of the Court of Appeals, set out in the Appendix herein, has not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered October 14, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

A. What was the intent of Congress with respect to the punishment that might be imposed under the Act of August 24, 1937, Ch. 747 (12 U.S.C. 588b, 50 Stat. 749), where the petitioner was convicted of the offense of entering a bank with intent to commit in such bank a larceny, and of the offense of larceny of money totalling $591.95 belonging to such bank?

B. Whether the act of entering an insured bank with the intent of committing larceny therein was merged into the completed act of stealing money belonging to such bank.

C. Whether the rule laid down in *Prince* v. *United States*, 352 U.S. 322, 77 S. Ct. 403, 1 L. Ed. 2d 370, which held that the crime of entry of a bank with intent to commit a felony or larceny therein merged into the completed crime, is applicable in the situation where a robbery is not committed after the unlawful entry, as in the *Prince* case, but the crime of grand larceny.

D. Was the sentencing court empowered to impose a maximum term of twenty years or a maximum term of ten years on Counts One and Two of the indictment herein?

STATUTES INVOLVED.

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than

$10,000 or imprisoned not more than twenty-five years, or both.

The predecessor statute, the Act of May 18, 1934, Ch. 304, 48 Stat. 783, as amended, 12 U.S.C. (1946 Ed.) 588b, provided in pertinent part:

> (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> (b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

STATEMENT.

An information containing three counts was filed against petitioner in the United States District Court for the District of Kansas on March 10, 1947. Count One charged that on January 9, 1947, petitioner entered the Ramona State Bank in the District of Kansas, an insured bank of the Federal Deposit Insurance Corporation, with the intent to commit larceny in such bank. Count Two charged that on the same date he did take and carry away with intent to steal the same, $591.95 in money belonging to such bank. Count Three charged that on the fourth day of January, 1947, he transported a stolen motor vehicle from Muskogee, Oklahoma, to Ramona, Kansas, and that he then knew the motor vehicle to have been stolen. Petitioner entered a plea of guilty to each count. The court imposed a sentence of imprisonment for a term of 20 years on Count One and imprisonment for a term of ten years on Count Two, to begin at the expiration of the sentence on Count One, and imprisonment for a term of five years on Count Three, to run concurrently with the sentences imposed in Counts One and Two.

On May 8, 1957, petitioner filed a motion to vacate and set aside the sentence imposed on Count One on the ground that he was subject to imprisonment on Counts One and Two for not more than a term of ten years. The doctrine of merger announced in the *Prince* case, *supra*, was the basis of the motion.

On May 16, 1957, the trial judge purported to grant the motion, but again sentenced petitioner *nunc pro tunc* to the custody of the Attorney General for a period of twenty years on Count One, and set aside the plea of guilty on Count Two and the sentence on Count Two.

The court further sentenced petitioner to imprisonment for a term of five years on Count Three to run concurrently with the twenty-year sentence imposed on Count One. The court refused to set aside the twenty-year sentence imposed on Count One, the entry with intent count.

Petitioner appealed from the judgment of the trial court imposing the last sentence of twenty (20) years. On October 14, 1957, the Court of Appeals for the Tenth Circuit, Chief Judge Bratton dissenting, affirmed the judgment of the District Court.

The basis for federal jurisdiction in the court of first instance is provided for in 18 U.S.C. 3231.

ARGUMENT.

The Court of Appeals for the Tenth Circuit has decided a federal question in conflict with an applicable decision of this Court.

On February 27, 1957, this Court handed down its decision in *Prince* v. *United States*, 352 U.S. 322, 77 S. Ct. 403, 1 L. Ed. 2d 370, which involved interpretation of the Federal Bank Robbery Statute, 18 U.S.C. 2113, formerly 12 U.S.C. 588b. The question presented and determined was whether the crime of entering a bank with intent to commit a felony therein was merged with the crime of robbery when the latter was consummated so that a sentence could be imposed for the completed act only. The Court pointed out that the problem had puzzled the courts for several years resulting in a conflict between the circuits. Because of the recurrence of the question and to resolve the conflict, the Court granted certiorari.

The Court, in an opinion written by Chief Justice Warren, reversed the Court of Appeals for the Fifth Circuit,

and held that a fifteen-year sentence imposed on Prince for entering a bank with intent to commit a felony or larceny therein, in addition to a twenty-year sentence imposed for committing a robbery after the entry, was invalid for the reason that the unlawful entry crime merged into the completed crime of robbery.

It was decided that the unlawful entry provision of the Act, 18 U.S.C. 2113 (a), formerly 12 U.S.C. 588b (a), was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the unlawful act. The court stated:

> "The gravamen of the offense is not the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the crime if the robbery is consummated" (77 S. Ct. l. c. 407).

Despite the clear language of the *Prince* decision that it was highly unlikely that the Attorney General, in recommending passage of the 1937 amendment to the Bank Robbery Act, August 24, 1937, Ch. 747, 50 Stat. 749, would have wanted to have an offender given ten years for the larceny plus twenty years for entering the bank with intent to steal, and further, despite the holding that the heart of the offense was not the act of entry but the intent to steal, and the ultimate holding that the crime of unlawful entry merged into the completed crime, the Court of Appeals held that the crime of unlawful entry *did not merge* into the crime of grand larceny of bank funds. Rather, the Court held *the crime of grand larceny merged into the unlawful entry*. This is in clear and direct conflict with and in absolute disregard of the Supreme Court's mandate in the *Prince* case.

The court below has thus chosen to limit the doctrine of merger in bank robbery cases as laid down in the *Prince* case to those instances involving unlawful entry and robbery by force and violence or by use of a dangerous weapon. If larceny is involved, the lower court holds that the consummated act merges into the unlawful entry, while the *Prince* case clearly holds that the unlawful entry merges into the consummated crime.

In its reasoning, the Court of Appeals developed a new approach to Congressional purpose in adding the crimes of entry with intent and larceny to the Bank Robbery Act by the 1937 amendment. In its opinion, set out in the Appendix herein, the Court said:

> "We are of the opinion that Congress, in order to cover all crimes against banks in the particular field dealt with, added the larceny provisions in the 1937 Act to cover a situation where a person entered a bank with no unlawful intent, but after entry formed an intent to commit and committed a larceny, or where a larceny was committed and the fact of entry with unlawful intent could not be established."

In other words, the Court is attributing an intent by Congress to cover a "spur-of-the-moment" crime.

This language clashes most emphatically with that of Chief Justice Warren in the *Prince* case where he said:

> "It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters the bank for the purpose of committing a crime, but is frustrated for some reason before committing the crime." (77 S. Ct. l. c. 406).

The Attorney General, in his letter, which has been referred to in the opinion of the court below and in the

Prince opinion, made it clear that he merely wanted the larceny provision enacted to cover the situation where a person stole bank funds, in order to cover a loophole in the then existing law. H. R. 732, 75th Congress, First Session. The original Bank Robbery Act, Act of Congress, May 18, 1934, Ch. 304, 48 Stat. 783, did not cover the situation where a person stole bank funds without force and violence or with the use of dangerous weapons.

While the Court had attempted by clear and unambiguous language to settle the doctrine of merger and multiple punishment with respect to the Federal Bank Robbery Act, and thus end the conflict that had developed, it appears that the lower courts have not accepted the *Prince* ruling and are prepared to engraft exceptions to the rule therein laid down. This tendency may be halted at this juncture by a clear reaffirmance of the *Prince* doctrine and also a clear holding that entry of a bank with intent to commit a felony or larceny therein merges into the consummated crime.

This is a unique statute of limited purpose. The question of interpretation is a narrow one and should be confined to the statute only and should be differentiated from other problems in this general field raised under other statutes. Thus spoke Chief Justice Warren. The court below apparently is not ready or is unwilling to accept this view.

Chief Judge Bratton entered a dissent in this case in which he pointed out that the problem herein concerned was whether the act of unlawful entry merged into the completed act of stealing money rather than the effect the application the doctrine of merger would have on the penalty. Plainly, the majority of the court was thinking of the difference in penalties rather than the consummated act

concept of the *Prince* case. His Honor drew attention to the fact that if less punishment were imposed as the result thereof, it is a matter to be corrected by Congress.

Thus, it appears that it is of vital necessity that the *Prince* decision be reaffirmed. If the language of the case is not conducive to a clear understanding of its purpose so as to serve as a guide for the future, it should be clarified. In any event, it appears clear that the case has been misunderstood, has not been followed, and a gross injustice would be done to petitioner who has already served ten and one-half years and approximately four and one-half years longer than he should serve with good time and industrial allowances if his case is within scope of the merger doctrine laid down in the *Prince* case.

Further conflict has arisen.

In *Kitts* v. *United States*, 243 F. 2d 883 (C. A. 8), decided May 8, 1957, a situation similar to that presented in the case at bar was before the court. The court vacated the ten-year sentence imposed on the larceny count and held that the twenty-year sentence imposed on the unlawful entry count was valid and must stand. The court made no reference to the doctrine of merger laid down in the *Prince* case and held that this Court in that case had simply determined that upon multiple convictions under the various subsections of the Bank Robbery Statute, only one sentence can be imposed (page 884). This holding is clearly in contravention of the mandate of this Court and takes its place alongside the case at bar as being in conflict with the decision of this Court on a federal question.

However, this is not the only conflict. In *Rickett* v. *United States*, 241 F. 2d 937, decided March 19, 1957 (C. A. 5), a *per curiam* opinion reveals only that the case was decided on the authority of *Prince* v. *United States*,

supra. The original transcript and briefs in the *Rickett* case on file in the office of the Clerk of the Court of Appeals for the Fifth Circuit show that a two count indictment was involved. Count One charged entry of a bank with intent to commit a felony therein. Count Two charged robbery by force and violence and by the use of a dangerous weapon. This is the precise situation that prevailed in the *Prince* case. Sentences of ten years to run consecutively were imposed on each count. An appeal followed. Argument was stayed, however, pending the outcome of the *Prince* case which was then before the Supreme Court. When the *Prince* decision was handed down, the court then decided the *Rickett* case. Acting under the instructions of the Circuit Court of Appeals, the trial court then set aside the sentence imposed on the robbery count and allowed the ten-year sentence to stand on the unlawful entry count. While the ultimate result happens to be the same in this case, the fact remains that if the *Prince* decision were being followed, the unlawful entry count would merge into the robbery count rather than the robbery count merging into the entry count. The error in the *Rickett* case appears only technical but indicative of misunderstanding of the *Prince* doctrine.

However, the *Rickett* case in its transcript and briefs played an important role in another case in the Fifth Circuit which further emphasized uncertainty and confusion in this field.

In *United States* v. *Ellis Raymond Williamson*, United States District Court, Southern District of Florida, Tampa Division, No. 6192-T-CR, the indictment charged unlawful entry of a bank with intent to commit a felony therein in one of the counts, and larceny in two other counts. Consecutive sentences of twenty years for the unlawful entry and eight years on each of the larceny counts, or a total

sentence of thirty-six years, was imposed. An order entered June 26, 1957, by Judge Byron Simpson, recited that this case could not be distinguished in principle from the *Prince* decision and that a motion to vacate filed under 28 U.S.C. 2255 was well taken. The twenty-year sentence was vacated and the two eight-year sentences were ordered to run concurrently so that the total sentence was corrected to stand at eight years. He accepted the merger doctrine of the *Prince* case and accordingly, merged the entry count into the counts charging the consummated unlawful act.

The Government appealed this case and it is now pending before the Circuit Court of Appeals for the Fifth Circuit, case No. 16808. The briefs have not been filed in that case nor has argument been presented.

The Court pointed out that it had also considered the *Rickett* case and had obtained the transcript and briefs from the Clerk of the Fifth Circuit Court of Appeals for examination.

It is most earnestly urged that this conflict is real and has affected the substantive rights of petitioner and will affect the rights of those involved in future cases. The *Prince* decision is a recent one and it is submitted that it is of great importance to the administration of our criminal law that the conflict that has developed be resolved before further conflicts appear.

It is clear that the situs of the sentencing court may determine whether the *Prince* decision will be interpreted one way or another. Different interpretations lead to varying sentences which may involve a difference of ten years.

To epitomize the end results of the decisions: The Supreme Court, perhaps the Fifth Circuit Court of Ap-

peals, and at least one district court adopt the position that the unlawful entry merges into the consummated crime. The Tenth and Sixth Circuit Courts of Appeal hold that the entry with intent to commit a felony or larceny merges into the completed unlawful act when the act is robbery. When the consummated act is larceny, then the larceny merges into the unlawful entry. The positions are diametrically opposed and should be resolved.

An appeal is made to the Honorable Court to resolve the conflict and reaffirm or clarify the *Prince* decision. A delay in this respect may result in irreparable injury and injustice to those individuals involved and will place an aura of uncertainty and indecisiveness on the entire structure of sentencing under the Bank Robbery Statute. The granting of this petition and a hearing of the merits should determine the question with finality and remove the problems raised herein from further debate and confusion.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

JOSEPH P. JENKINS,
Counsel for Petitioner.

PHILLIPS, Circuit Judge.

An information containing three counts was filed against Purdom in the United States District Court for the District of Kansas on March 10, 1947. Count One charged that on January 9, 1947, Purdom entered the Ramona State Bank in the District of Kansas, an insured bank of the Federal Deposit Insurance Corporation, with the intent to commit larceny in such bank. Count Two charged that on the same date he did take and carry away with intent to steal the same, $591.95 in money belonging to such bank. Count Three charged that on the fourth day of January, 1947, he transported a stolen motor vehicle from Muskogee, Oklahoma, to Ramona, Kansas, and that he then knew the motor vehicle to have been stolen. Purdom entered a plea of guilty to each count. The court imposed a sentence of imprisonment for a term of 20 years on Count One and imprisonment for a term of 10 years on Count Two, to begin at the expiration of the sentence on Count One, and imprisonment for a term of 5 years on Count Three, to run concurrently with the sentences imposed on Counts One and Two.

On May 8, 1957, Purdom filed a motion to vacate and set aside the sentence imposed on Count One, on the ground that he was subject to imprisonment on Counts One and Two for not more than a term of 10 years.

On May 16, 1957, the trial judge granted the motion and sentenced Purdom *nunc pro tunc* to the custody of the Attorney General for a period of 20 years on Count One and set aside the plea of guilty on Count Two and the sentence on Count Two. The court further sentenced Purdom to imprisonment for a term of 5 years on Count Three, to run concurrently with the 20-year sentence imposed on Count One. From the judgment of the court imposing the last sentence, Purdom has appealed.

In *Jerome* v. *United States*, 318 U.S. 101, 102, the Supreme Court reviewed the legislative history of the Act of May 18, 1934, 48 Stat. 783, 12 U.S.C.A., §588(b) and the Act of August 24, 1937, 50 Stat. 749, 12 U.S.C.A., §588(b), as follows:

"Prior to 1934, banks organized or operating under federal law were protected against embezzlement and like offenses by R. S. 5209, 40 Stat. 972, 12 U.S.C., §592. But such crimes as robbery, burglary, and larceny directed against such banks were punishable only under state law. By 1934 great concern had been expressed over interstate operations by gangsters against banks—activities with which local authorities were frequently unable to cope. H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2. The Attorney General, in response to that concern, recommended legislation embracing certain new federal offenses. S. 2841, 73d Cong., 2d Sess. And see 78 Cong. Rec. 5738, Sec. 3 of that bill made it a federal crime to break into or attempt to break into such banks with intent to commit 'any offense defined by this Act, or any felony under any law of the United States or under any law of the State, District, Territory, or possession' in which the bank was located. Sec. 2 made it an offense to take or attempt to take money or property belonging to or in the possession of such a bank without its consent or with its consent obtained 'by any trick, artifice, fraud, or false or fraudulent representation.' This bill was reported favorably by the Senate Judiciary Committee (S. Rep. No. 537, 73d Cong., 2d Sess.) and passed the Senate. 78 Cong. Rec. 5738. The House Judiciary Committee, however, struck out §2, dealing with larceny, and §3, dealing with burglary. H. Rep. No. 1461, *supra*, p. 1. And the bill was finally enacted without them. But it retained the robbery provision now contained in the first clause of §2(a) of the Bank Robbery Act.

"In 1937 the Attorney General recommended the enlargement of the Bank Robbery Act 'to include lar-

ceny and burglary of the banks' protected by it. H. Rep. No. 732, 75th Cong., 1st Sess., p. 1. The fact that the 1934 statute was limited to robbery was said to have produced 'some incongruous results—a 'striking instance' of which was the case of a man who stole a large sum from a bank but who was not guilty of robbery because he did not display force or violence and did not put any one in fear. *Id.*, pp. 1-2. The bill as introduced (H. R. 5900, 75th Cong., 1st Sess., 81 Cong. Rec. 2731) added to §2(a) two new clauses—one defining larceny and the other making it a federal offense to enter or attempt to enter any bank with intent to commit therein 'any larceny or other depredation.' For reasons not disclosed in the legislative history, the House Judiciary Committee substituted 'any felony or larceny' for 'any larceny or other depredation.' H. Rep. No. 732, *supra*, p. 2. With that change and with an amendment to the larceny clause distinguishing between grand and petit larceny (81 Cong. Rec. 5376-5377), §2(a) was enacted in its present form."

The Act of May 18, 1934, *supra*, defined the term "bank" as follows:

> "That as used in this Act the term 'bank' includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States."

The pertinent provisions of the Act of August 24, 1937, *supra*, read as follows:

> "That subsection (a) of section 2 of the Act of May 18, 1934 (48 Stat. 783, U.S.C., Title 12, Sec. 588b), be and the same is hereby, amended to read as follows:
>
> "'(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value be-

longing to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.' "

As carried into Title 18, U.S.C., Crimes and Criminal Procedure, approved June 25, 1948, effective September 1, 1948, such provisions were amended to read as follows:

"§2113. BANK ROBBERY AND INCIDENTAL CRIMES.

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or

"Whoever enters or attempts to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony affecting such bank and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; * * *."[1]

In *Prince* v. *United States*, 352 U.S. 322, the court construed the penalty provisions of §2113(a), *supra*. Prince was convicted on a two-count indictment. The first count charged robbery of a Federally insured bank and the second count charged entering the bank with intent to commit a felony. He was sentenced to 20 years' imprisonment for the robbery and 15 years for the entry with intent to commit a felony, the two sentences to run consecutively. Thereafter, Prince filed a motion to vacate or correct the sentence. The trial court denied the motion and the Fifth Circuit affirmed. See *Prince* v. *United States*, 230 F. 2d 568. In *Prince* v. *United States*, 352 U.S. 322, 324-329, the court said:

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[1]The definition of the term "bank" was also amended to read as follows:

"(f) As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, a Federal Savings and Loan Association, or other banking institution organized or operating under the laws of the United States and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

It will be noted that the words "or larceny" were omitted, so that the entering offense required the entry to be with intent to commit a "felony affecting" the bank. Thus, the entering offense became akin to common law burglary, with certain of the ingredients of the latter offense omitted. If the facts as to the entering in the instant case were as stated in the brief of the United States, all of the elements of common law burglary were present, except the building entered was not a dwelling house.

"Whether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery when the latter is consummated has puzzled the courts for several years. A conflict has arisen between the circuits. * * * *The question of interpretation is a narrow one, and our decision should be correspondingly narrow* (Italics ours).

"The original Bank Robbery Act was passed in 1934. It covered only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter. In 1937 the Attorney General requested that the Act be amended. In his letter proposing the bill, the Attorney General declared that 'incongruous results' had developed under the existing law. He cited as a striking instance the case of

"'* * * a man [who] was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting anyone in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.'

"The Act was amended accordingly to add other crimes less serious than robbery. * * *

* * *

"* * * No separate penalty clause was added for the crime of unlawfully entering. If was simply incorporated into the robbery provision.

"The Government asks us to interpret this statute as amended to make each a completely independent offense. It is unnecessary to do so in order to vindicate the apparent purpose of the amendment. The only factor stressed by the Attorney General in his

letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. It was manifestly the purpose of Congress to establish lesser offenses. But in doing so there was no indication that Congress intended also to pyramid the penalties.

"The Attorney General cited the situation of larceny to illustrate his position. It is highly unlikely that he would have wanted to have the offender given 10 years for the larceny plus 20 years for entering the bank with intent to steal. There is no reason to suppose that he wished to have the maximum penalty for robbery doubled by the imposition of 20 years for the robbery to which could be added 20 years for entering the bank. * * *

"It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated. To go beyond this reasoning would compel us to find that Congress intended, by the 1937 amendment, to make drastic changes in authorized punishments. This we cannot do. * * *

"*We hold, therefore, that when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years, but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with the felonious intent.*" (Italics ours).

Relying on the Prince case, Purdom contends that the unlawful entering offense merged into the larceny offense when the latter was committed. In effect, he admits that if he had not committed the larceny, but had only entered the bank with intent to commit a larceny therein, he would have been subject to imprisonment for a term of 20 years on the first count. He asserts, however, that since he went further after entering the bank and committed a larceny of money in excess of $50, he could only be sentenced for a term not to exceed 10 years. If the amount of money which he stole had been less than $50, by identical reasoning, he could have contended that he could only be sentenced to a term of 1 year.

Under the common law doctrine of merger of offenses, the merger of one offense into another occurs only when the same criminal act constitutes both a felony and a misdemeanor. Under that doctrine, in such a case the misdemeanor merges in the felony and the latter only is punishable. The rule does not apply where both offenses are felonies or misdemeanors.[2]

At the time the offense in the instant case was committed, a felony and a misdemeanor were defined as follows:

> "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: * * *." 18 U.S.C., §541 (1940 Ed.)[3]

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[2]*People* v. *Hill*, 345 Ill. 103, 177 N.E. 723, 725; *State* v. *Andrews*, Conn. , 142 Atl. 340, 842; 22 C.J.S., Criminal Law, §10, pp. 61-62.

[3]The definitions, without substantial change, were carried into Title 18, U.S.C., Crimes and Criminal Procedure, Act of June 25, 1948 (18 U.S.C.A., §1).

Hence, both counts of the indictment in the Prince case charged felonies. Likewise, both Counts One and Two of the indictment in the instant case charged felonies. It seems clear to us, therefore, that the Supreme Court in opinion in the Prince case was not applying the common law doctrine of merger of offenses. Rather, the court was seeking to ascertain the intent of Congress with respect to the punishment that might be imposed under §2113(a), *supra* where the defendant was convicted of entering a bank with intent to commit a felony affecting such bank and also of the offense of robbery. Likewise, our problem is to determine the intent of Congress with respect to the punishment that might be imposed under the Act of August 24, 1937, where the defendant was convicted of the offense of entering a bank with intent to commit in such bank a larceny and of the offense of larceny of money exceeding $50 in value belonging to such bank.

We are of the opinion that Congress, in order to cover all crimes against banks in the particular field dealt with, added the larceny provisions in the 1937 Act to cover a situation where a person entered a bank with no unlawful intent, but after entry formed an intent to commit and committed a larceny, or where a larceny was committed and the fact of entry with unlawful intent could not be established.

In the situation presented in the Prince case the statute (§2113(a), *supra*) prescribed as a penalty for robbery or for entry with intent to commit a felony a fine of not more than $5,000, or imprisonment for not more than 20 years, or both. However, in the instant case the Act of August 24, 1937, prescribed as a penalty for the offense of entering a bank with intent to commit a felony or larceny therein, a fine of not more than $5,000, or imprisonment for not more than 20 years, or both, and in a separate provision,

for the offense of larceny of money or property exceeding $50 in value, a fine of not more than $5,000, or imprisonment for not more than 10 years, or both. If the statute is to be construed as contended by Purdom, then if a defendant entered a bank with intent to commit a larceny, but his purpose was frustrated before committing the larceny, or, if before committing the larceny he repented of his criminal intent, he could be sentenced for a term not to exceed 20 years. On the other hand, if he went ahead after entering the bank and committed a larceny of property of value exceeding $50, he could be sentenced only for a term not to exceed 10 years and if the larceny was of property of value not exceeding $50, he could be sentenced only for a term of 1 year. We do not think Congress intended such an incongruous result. Rather, we think Congress intended that if a person entered a bank with intent to commit a larceny and after entering the bank committed a larceny of property of value exceeding $50, the maximum imprisonment sentence which could be inflicted is 20 years and not 10 years.

The Eighth Circuit so held in *Kitts* v. *United States*, 8 Cir., 243 P. 2d 883, decided May 6, 1957. In that case the defendant was convicted under the Bank Robbery Act on two counts of a three-count indictment. The first count charged entry of the bank with intent to commit a felony affecting such bank, to-wit, a larceny of property of the bank exceeding $100 in value; and the second count charged larceny of property of the bank exceeding $100 in value. The defendant was sentenced to a term of imprisonment for 20 years on Count One and 10 years on Count Two. The Eighth Circuit, after reviewing the decision in the Prince case, held that the 20-year sentence was valid and directed that the 10-year sentence be vacated.

We conclude that the sentence of 20 years imposed on Count One in the instant case was valid.

Affirmed.

BRATTON, Chief Judge, dissenting:

It is my view that the decisive question upon which this case should turn is whether the act of entering the the insured bank with the intent of committing larceny therein was merged into the completed act of stealing money belonging to the bank, not the effect which application of the doctrine of merger has upon the penalty. In *Prince* v. *United States*, 352 U.S. 322, it was expressly held that the gravamen of the offense of entering the bank was the intent to steal, and that such mental element was merged into the completed crime of robbery. If appropriate application of the doctrine of merger leads to the undesired result of less punishment that might otherwise be imposed, it is a matter to be corrected by Congress. I would reverse.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 603

JACK ROBERT PURDOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. A 1–11) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered October 14, 1957. The petition for a writ of certiorari was filed November 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a person convicted of entry into a bank with intent to commit larceny and of larceny of the bank's property may be sentenced to the maximum

established for the crime of entry, rather than the lower maximum fixed for larceny.

STATUTE INVOLVED

The Act of May 18, 1934, ch. 304, Section 2, 48 Stat. 783, as amended by the Act of August 24, 1937, ch. 747, 50 Stat. 749, 12 U. S. C. (1946 ed.) 588b, provided in pertinent part as follows:

> § 588b:
>
> (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> * * * * *

STATEMENT

In April, 1947, in the United States District Court for the District of Kansas, petitioner pleaded guilty (R. 3) to an information charging, in the first count, that on January 9, 1947, he entered a federally insured bank with intent to commit larceny, and in the second count that he stole $591.95 belonging to the bank (R. 2). He was sentenced to twenty years for the entry and ten years for the larceny, the sentences to run consecutively (R. 3).

In May, 1957, he filed a motion to vacate the sentence on the entry count, alleging that he could be sentenced only for the completed larceny (R. 4). The district court vacated the sentence on count 2 charging larceny and sentenced petitioner *nunc pro tunc* to twenty years on count 1 which charged entry with intent to commit larceny (R. 5). The Court of Appeals affirmed, holding that petitioner could properly be sentenced on the entry count.[1]

ARGUMENT

Petitioner argues that even though entry into a bank with intent to commit a felony was made subject to a maximum penalty of twenty years (presumably because the entry could be a forcible one in the nighttime as well as a peaceful one in the daytime), if that entry is followed by a successful theft, the maximum punishment is reduced to ten years. By his logic, as the court below pointed out, the completed theft of

[1] Petitioner also pleaded guilty to a third count charging transportation of a stolen vehicle. He received a sentence of five years on that count to run concurrently with the sentence on the other counts (R. 5). That count is not here involved.

less than $50 would reduce the penalty to one year, whereas an entry with intent to steal which proves unsuccessful would still remain subject to the maximum penalty of twenty years. Nothing in the decision of this Court in *Prince* v. *United States,* 352 U. S. 322, compels the attribution to Congress of so illogical and inconsistent an intent.

In *Prince,* this Court had before it the question whether consecutive sentences could validly be imposed under the Bank Robbery Act for entering a bank with intent to rob and for robbery. The statute provided a twenty-year maximum for the robbery (twenty-five in the aggravated form) and for the entry. This Court held, as a matter of statutory construction, that "when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years, but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with felonious intent." 352 U. S. at p. 329. The Court pointed out that in 1934 Congress had made only robbery and its aggravated forms the offense, and that the 1937 amendments, creating the offenses of unlawful entry and larceny, had the purpose of establishing lesser offenses. 322 U. S. at pp. 325–327.

That same legislative history shows that the decision below as to entry and larceny is correct as a matter of statutory construction. The crime of felonious entry, with a twenty-year maximum, was created at the very same time as the crime of larceny with either a one-year or a ten-year maximum. Obvi-

ously, therefore, Congress regarded the crime of entering, which could be a forcible breaking in the nighttime, as a more serious offense than the taking of the money. The legislative history of the 1937 amendments, set forth at pp. 24–28 of the government's brief in *Prince* (No. 132, O. T. 1956), shows that the larceny provisions were inserted primarily to take care of the situation where a person already lawfully in the bank engaged in theft. Thus the Attorney General, in suggesting the 1937 amendments, mentioned the situation of a man who had taken $11,000 during a momentary absence of one of the employees. See 352 U. S. at p. 326. The distinction between grand and petit larceny came in response to Representative Wolcott's objection that the bill "puts simple larceny on the same plane as robbery and breaking and entering in an attempt to commit larceny." 81 Cong. Rec. 4656. The ensuing colloquy further clarifies the Congressional thinking to the effect that at least a forcible entry, breaking and entering, was a more serious crime than larceny:

> Mr. RANKIN. How are you going to tell what a thief is going to do when he gets into a bank? If a man breaks into a house or bank he will kill anyone in it to carry out his purpose.
>
> Mr. WOLCOTT. If the gentleman will read the bill and report, he will see that it not only punishes for robbery, which is putting in fear, and breaking and entering, but the larceny of anything within the bank, whether the man is there lawfully or not. If a man should go into a bank to make a deposit and pick up a pencil and walk out with it he would be on the same

> plane, according to this bill, as a man who deliberately broke in during the nighttime and committed larceny. I know the gentleman does not agree with that.
>
> Mr. RANKIN. I do not, but if a man breaks into a house he is going to commit a crime.
>
> Mr. WOLCOTT. There is no question about that. Breaking and entering is a crime in and of itself. [81 Cong. Rec, 4656]

We, of course, accept the implicit holding of the district court that Congress did not intend to punish separately both the entry and the larceny after the entry; that a defendant is subject to one punishment or the other. What the legislative history makes very clear is that the larceny provision, with its ten-year maximum, was directed at simple stealing without an unlawful entry, and that Congress did not intend that the larceny provision should displace the penalty for felonious entry.

Petitioner relies upon the following language of *Prince* to support his position that, however incongruous the result, the entry must be deemed to have been merged into a succesful larceny (352 U. S. at p. 328):

> It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public

door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated.

This language cannot, however, be divorced from the issue in *Prince* to which it was addressed[2]—whether consecutive sentences could be given for the completed crime of robbery, which Congress first made a crime, and for the crime of entry, which Congress later added, bearing the same or lesser punishment. The whole *Prince* opinion makes it clear that, in speaking of merger, the Court was not dealing with merger in the common law or double jeopardy sense of a crime which could not constitutionally be a separate offense. The *Prince* decision is based wholly on the intent of Congress as shown by the words of the statute and the legislative history. As discussed above, the legislative history of the larceny provision is different from that of the robbery provision, and the legislative history makes explicit, what the maximum punishments provided in the statute suggest, that Congress regarded the crime of felonious entry as potentially more dangerous than larceny. Since the *Prince* decision rests on legislative intent, it does not require that the larceny provisions, with their separate legislative history, be equated to the robbery provisions. The statute is reasonably read, as the courts below in this case have read it, to provide that, where a larceny follows a felonious entry, punishment

[2] The Court specifically noted in *Prince* that "The question of interpretation is a narrow one, and our decision should be correspondingly narrow." 352 U. S. at p. 325.

may be fixed under the maximum provided for the felonious entry. The lesser punishments for larceny can be interpreted as applying to a simple theft after lawful entry.

There is no conflict of circuits on this issue. As petitioner himself notes (Pet. 10), the Court of Appeals for the Eighth Circuit has ruled, in accord with the decision below, that, while a defendant may not be punished for both the entry and the larceny, the sentence may be imposed on the entry count in accordance with the punishment fixed by Congress for that offense. *Kitts* v. *United States*, 243 F. 2d 883. The District Court for the Southern District of Florida felt compelled by the *Prince* decision to vacate sentence on the entry count and punish only for the larceny in *United States* v. *Williamson* (Pet. 11–12), and an appeal has been noted from that decision.[3] So far as we know, these are the only decisions on the specific problem here involved.

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[3] If the Fifth Circuit should affirm in *Williamson*, thus creating a conflict in circuits, and if the issue should ultimately be resolved adversely to the government, petitioner would be able to renew his application to vacate the sentence since, as the records of his case would show, the sentence would be unlawful.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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RUFUS D. MCLEAN,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

DECEMBER 1957.